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CHARLES ELMORE OROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 1145

IN THE MATTER

of

A. L. HARTRIDGE COMPANY INCORPORATED,

*Bankrupt.*

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

*Petitioner,*

—against—

BAYARD I. REISLEY, as Trustee in Bankruptcy of A. L.  
HARTRIDGE COMPANY, INCORPORATED, Bankrupt,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF

HENRY K. CHAPMAN,  
*Counsel for Petitioner.*



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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

*To the Honorable the Chief Justice and the Associate  
Justices of the United States:*

Indemnity Insurance Company of North America, respectfully prays for a writ of certiorari to the Circuit

Court of Appeals for the Second Circuit, to review a decree of that court entered in the above entitled proceedings on December 3, 1945 (R. 29). A rehearing was denied by the Circuit Court on January 22, 1946. Said decree reversed in part an order of the District Court for the Southern District of New York dated July 14, 1945 (R. 5-6), which confirmed the order of the Referee in Bankruptcy dated April 24, 1945 (R. 12-13).

The first part of the Referee's order denied petitioner's application to vacate an order directing a 5% dividend to creditors. The order also denied petitioner's application to direct the trustee to pay to it \$7,786.94. The second branch of the Referee's order denied the petition of the trustee for a reconsideration of a prior order (from which no review was ever sought) dated April 14, 1942 impressing a trust on funds in his hands in pursuance of the provisions of Section 36a of the Lien Law of the State of New York and directing the trustee to pay petitioner \$5,263.40.

The opinions of the Circuit Court of Appeals for the Second Circuit have been reported in 153 F. (2d) 296. The opinions of the District Court and the Referee have not been reported.

### **Summary Statement of Matter Involved**

The bankrupt corporation, a general building contractor, agreed to construct for W. T. Grant Company a building on land owned by Grant at Buffalo, N. Y. The agreement was made April 28, 1939, and the work completed July 1, 1940. The petitioner insured the bankrupt for workmen's compensation, public liability and general liability insurance in connection with the work on that building. Your petitioner secured a judgment in the sum of \$13,-

050.34 for the premiums due from Hartridge on said job. On September 15, 1941, Hartridge was adjudicated a bankrupt on its voluntary petition (R. 14-15).

On January 26, 1942, Grant paid the trustee in bankruptcy \$6,763.40 on account of that contract (R. 15).

On March 10, 1942, your petitioner filed a reclamation proceeding to recover from the trustee the amount paid to the trustee by Grant. On April 14, 1942, the Referee in Bankruptcy made an order adjudging said sum to be a trust fund to be applied to the payment of the claim of your petitioner and to creditors similarly situated as provided in Section 36a of the Lien Law of the State of New York. Said order directs the trustee to pay \$5,263.40 to petitioner and to hold the balance of \$1,500.00 subject to the further order of the Court. Pursuant to that order petitioner received \$5,263.40 from the trustee (R. 15-16).

On September 29, 1943, a creditor of the bankrupt applied for reconsideration of the order of April 14, 1942, and for an order directing your petitioner to repay to the trustee the money theretofore collected upon the ground that it was paid under a mistake of law. The trustee in bankruptcy appeared and participated in the hearing and urged the granting of this application. The application was denied by an order dated November 8, 1943 (R. 16), and upon petition for review to the District Court an order was entered dated January 14, 1944, confirming the decision of the Referee. No appeal was taken from this order (R. 8).

On March 2, 1943, the trustee settled its account with Grant and received \$17,085.62 in full payment of the construction contract (R. 16). On February 24, 1945, the Referee in Bankruptcy made an order directing the payment of a 5% dividend to general creditors (R. 5).

On March 6, 1945, your petitioner moved to vacate the order of February 24, 1945, and requested that the trustee be directed to pay to it the balance of \$1,500.00 previously retained under the order of April 14, 1942, and also to pay it the sum of \$6,286.94 out of the \$17,085.62 received from Grant. The trustee filed an answer in opposition which included a cross-petition for reconsideration of the order of April 14, 1942, and upon such reconsideration for an order directing petitioner to repay to the trustee the amount paid to it under the order of April 14, 1942. The Referee denied petitioner's application and denied the application of the trustee for a reconsideration (R. 9). On July 14, 1945, on petition for review filed by both parties, the District Court affirmed the Referee (R. 5-6).

By its decision of December 3rd, 1945, the Circuit Court of Appeals for the Second Circuit sustained the District Court and the Referee in denying the petition of Indemnity Insurance Company and reversed the Court below in its denial of the Trustee's cross-petition for reconsideration and remanded the matter for further consideration (R. 27-28). The reversal was based upon the erroneous theory that the order of April 14, 1942, was open to reconsideration at any time before the estate was closed as provided by Section 57k of the Bankruptcy Act.

On rehearing the Circuit Court acknowledged its error but adhered to its original determination (R. 40-42).

### **The Questions Presented**

The first three questions presented for decision by this Court concern themselves with the Referee's refusal to reconsider his order of April 14, 1942; the other two questions relate to the Referee's refusal to direct the trustee to pay petitioner the \$7,786.94.

1. Assuming the challenged order of the Referee was erroneous, was it final, binding and impregnable to subsequent attack, since review or appeal was not sought or taken within the time limited by court rule or law?

2. Does an unexplained delay of almost three years constitute laches?

3. Has the adoption by the Supreme Court of the Rules of Civil Procedure for the District Courts of the United States made applicable in bankruptcy by General Order XXXVII modified the rule in *Wayne Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, that a bankruptcy court may revise its judgments at any time during the pendency of the proceeding?

4. Is a trustee in bankruptcy justified in refusing to recognize the equitable rights of a beneficiary of a trust fund held by the trustee because he is protected by judicial immunity?

5. Can a trust relationship arise under the provisions of Section 36a of the Lien Law of the State of New York?

### **The Reasons for Allowing the Writ**

1. The decision of the Circuit Court of Appeals in the instant case, which seems to be contrary to the overwhelming weight of authority, constitutes, it is submitted, a serious danger to the principle of certainty and finality of an order from which no appeal was taken within the specified time. The decision cannot even be justified by considerations of equity, since the petitioner, by the exercise of the diligence required by the rules, could have taken a timely appeal.

When the Referee denied respondent's application for a rehearing of the order made by him on April 14, 1942, he based his decision on the sole ground that he had denied a previous application in September, 1943 because it was untimely made (R. 16-17). Clearly this decision did not consider the merits of the original order of April 14, 1942. Consequently the Circuit Court erred in holding that the Referee had considered the order of April, 1942 on its merits.

2. The decision of the Circuit Court of Appeals, holding that the District Court and the Referee had clearly abused their discretion in refusing to re-examine the order of April 14, 1942, after an unexplained delay of three years is such a departure from the accepted and usual course of equity jurisprudence and such an interference with the authority vested in them as to call for a review by this Court.

3. This Court has not passed upon the effect of the Federal Rules of Civil Procedure upon its decision in the *Wayne Gas Company* case (*supra*). In the instant case the Circuit Court of Appeals for the Second Circuit relied upon this Court's decision in the *Wayne Gas Company* case (R. 41) in holding that the petition for rehearing was timely. This decision of the Circuit Court is not in harmony with the Circuit Court of Appeals for the Tenth Circuit which held that the Federal Rules of Civil Procedure superseded the procedure outlined in the *Wayne Gas Company* case.

A determination of this question is of importance in resolving the conflict between the Circuit Courts and in maintaining uniform administration of bankruptcy proceedings.

4. The Circuit Court of Appeals in sustaining the order of the District Court and the Referee in their refusal to direct the trustee to pay to petitioner, as beneficiary, the balance of the trust fund held by him violated established principles of equity and is contrary to its own decision in the case of *City of New York v. Rassner*, 127 F. (2d) 703.

5. The Courts below erroneously construed the decision of the Court of Appeals of the State of New York in the case of *Raymond Concrete Pile Co. v. Federation Bank & Trust Co.*, 288 N. Y. 452, in holding that Section 36a of the Lien Law of the State of New York can never give rise to a trust in favor of the beneficiaries designated therein. This is an erroneous interpretation of the State Court's decision. That Court clearly limited its decision to only one issue, namely, that Section 36a of the Lien Law and other similar sections did not provide a civil remedy for the enforcement of the trust created thereby but provided only for its enforcement by action in the criminal courts. The decision did not rule out the possibility of the creation of a trust under that section. That statute was enacted by the Legislature of the State of New York to cure certain evils which had caused heavy losses to materialmen, suppliers, laborers and others named in the section. Unless this erroneous construction of the state law is corrected by this court, it will adversely affect the construction industry. Beneficiaries of the trust arising under that statute will be deprived of their rights in the bankruptcy courts of the State of New York and of other states wherein similar statutes have been enacted. The present legislative policy of both the federal and state governments is to encourage the construction industry to meet the housing demand. The removal at this time of any protection afforded that industry would be contrary to that public policy.

**PRAYER**

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send this Court on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order and decision of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

INDEMNITY INSURANCE COMPANY OF NORTH  
AMERICA

By JAMES R. ROONEY

HENRY K. CHAPMAN,  
*Attorney for Petitioner,*  
291 Broadway,  
New York, N, Y.

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF NEW YORK, ss.:

JAMES R. ROONEY being duly sworn says: I am manager of the petitioner, a corporation organized under the laws of the State of Pennsylvania; and I have knowledge of this litigation. The foregoing petition and the matters therein set forth are true to the best of my knowledge, information and belief.

JAMES R. ROONEY

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### **Certificate of Counsel**

I certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

HENRY K. CHAPMAN